Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

NO. 79-256

STATE EX REL. CLETUS B. HANLEY,
PROSECUTING ATTORNEY OF KANAWHA
COUNTY, WEST VIRGINIA,

Relator,

vs.

JOHN HEY, JUDGE OF THE CIRCUIT
COURT OF KANAWHA COUNTY,
WEST VIRGINIA,

Petitioner
~~*Respondent.*~~

**PETITION FOR WRIT OF CERTIORARI
TO THE WEST VIRGINIA SUPREME
COURT OF APPEALS**

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STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY OF KANAWHA COUNTY, WEST VIRGINIA,

Relator,

VS.

JOHN HEY, JUDGE OF THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE WEST VIRGINIA SUPREME COURT OF APPEALS

Petitioner, John Hey, Judge of the Circuit Court of Kanawha County, West Virginia, respondent below, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia entered in this proceeding on May 22, 1979.

OPINION BELOW

The opinion below was rendered upon a Writ of Prohibition by the West Virginia Supreme Court of Appeals and the case is officially reported in 255 S.E.2d 354, a copy appended hereto.

JURISDICTION

The judgment of the West Virginia Supreme Court of Appeals was entered on May 22, 1979, a copy of said judgment being appended hereto. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

I. Chapter 62, Article 12, Section 10, West Virginia Code, as construed by the West Virginia Supreme Court of Appeals violates probationer's minimum procedural and substantive due process rights.

II. Whether the failure to join the probationer in an original proceeding by writ of prohibition, the ultimate effect of which was to determine whether the probation was to be revoked, violated probationer's fifth, sixth and fourteenth amendment rights.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The principal constitutional provisions involved are the Fifth, Sixth and Fourteenth Amendments of the United States Constitution and Chapter 62, Article 12, Section 10, West Virginia Code of 1931, as amended, which is found in Volume 17 at Page 409 and 410, which reads as follows:

> "If at any time during the period of probation there shall be reasonable cause to believe that the probationer has violated any of the conditions of his probation, the probation officer may arrest him with or without an order or warrant, or the court which placed him on probation, or the judge thereof in vacation, may issue an order for his arrest, whereupon he shall be brought before the court, or the judge thereof in vacation, for a prompt and summary hearing. If it shall then appear to the satisfaction of the court or judge that any condition of probation has been violated, the court or judge may revoke the suspension of imposition or execution of sentence, impose sentence if none has been imposed, and order that sentence be executed. In computing the period for which the offender is to be imprisoned, the time between his release on probation and his arrest shall not be taken to be any part of the term of his sentence. If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that the probationer serve his sentence, the court or judge may, except when the violation was the commission of a felony, again release him on probation."

STATEMENT OF THE CASE

Probationer, Gregory Dale O'Scha, was once found guilty of breaking and entering and placed on probation by the petitioner, Honorable John Hey, Judge of the Circuit Court of Kanawha County, West Virginia. While he was on probation, he was given a notice that he had violated the terms of his probation by the commission of another felony and brought back before the Circuit Court of Kanawha County, West Virginia, on the probation violation charge prior to any determination being made anywhere as to his guilt or innocence of committing the second felony. The probationer plead guilty to violating his probation and the Circuit Court revoked his probation but did not make any findings as to whether he had, in fact, committed a second felony. Subsequently, upon a motion for reconsideration of sentence, the Circuit Court placed the probationer back on probation over the stated objection of the State of

West Virginia that the Court was prohibited therefrom by the above statute, Chapter 62, Article 12, Section 10, West Virginia Code. A writ of prohibition was applied for by the State of West Virginia ex rel. its prosecuting attorney to the Supreme Court of Appeals of West Virginia which granted the writ and ordered your petitioner to revoke the probation for the reason that the statute did not require the defendant to have been convicted of a felony—only to have committed one.

REASONS RELIED ON FOR GRANTING THE WRIT

I. CHAPTER 62, ARTICLE 12, SECTION 10, WEST VIRGINIA CODE, AS CONSTRUED BY THE WEST VIRGINIA SUPREME COURT OF APPEALS VIOLATES PROBATIONER'S MINIMUM PROCEDURAL AND SUBSTANTIVE DUE PROCESS RIGHTS.

In the case of *Gagnon* v. *Scarpelli*, 411 U. S. 778, 93 S. Ct. 1756, 36 L.Ed.2d 656 (1973), this Court held that minimum requirements similar to those for parolees described in *Morrissey* v. *Brewer*, 408 U. S. 471, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972), were applicable to probationers. These rights include the right to have a fact finding officer with discretion make the determinations required to a revocation of probation. In the case at bar, the probationer was sent a notice that he had violated his probation by breaking and entering which was claimed in the notice to be felonious. However, the probationer was never indicted, tried or convicted of the felony charge. The Circuit Court did not find he had committed a felony, but did find he was guilty of violating the conditions of his probation and revoked his probation. On motion for reconsideration of sentencing, the Circuit Court placed him once again on probation. At this point the State objected claiming the Court was without jurisdiction for the reason that

the probationer had committed a second felony and sought original relief from the Supreme Court of Appeals of West Virginia by writ of prohibition. Although the Circuit Court's order did not find the probationer had committed a felony and although the Circuit Court demurred and answered claiming it had not found the probationer to have committed a second felony and that he had not been found by another Court to have committed the felony, the Supreme Court of Appeals found he had committed a felony. The State Supreme Court held that since the notice had charged him with having committed a felony and that the probationer plead guilty to violating probation, the Circuit Court, regardless of its factual findings, was precluded from placing probationer once again on probation pursuant to Chapter 62, Article 12, Section 10, West Virginia Code.

The statute violates probationer's minimum rights because the probationer did not plead guilty to breaking and entering or to committing a felony, but to the charge that he was guilty of violating his probation. Therefore, the probationer was not provided with adequate notice of the proceedings against him, nor with a fact finding officer with discretion to decide the issues presented in his revocation, all of which is contrary to requirements of *Gagnon* v. *Scarpelli*, supra.

Further, the action of the West Virginia Supreme Court in this case is a denial of substantive due process. The distinction drawn by the Supreme Court between "committing" a felony and "conviction" of one and the usurpation of the Circuit Court's fact finding capacity as the trier of facts in a probationer's revocation hearing all violate substantive due process requirements. The statute requires that before the Cir-

cuit Court is precluded from placing a probationer on probation he must have committed a "felony." Felony is a word of art which implies committing a type of crime and at some point to have been found guilty of same. The Supreme Court's interpretation of "committing" a felony is too vague to advise the public of its meaning. It places the probationer in the position of being found guilty of "committing" a felony by a preponderance of the evidence regardless of whether he has ever been charged with the same or been adjudged as having committed one.

II. FAILURE TO JOIN THE PROBATIONER AS A DEFENDANT IN THE ORIGINAL PROCEEDINGS FOR WRIT OF PROBATION WAS A DENIAL OF PROBATIONER'S FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS.

The proceeding for prohibition in the Supreme Court of Appeals of West Virginia was an original proceeding before that Court in which pleadings, motions and evidence were permissible.

The Circuit Court demurred to the petition of the State requesting a writ of prohibition in the West Virginia Supreme Court for, among other reasons, that the State of West Virginia had not joined the probationer as a party and that this violated his constitutional rights. The Supreme Court held that it was true that in prohibition proceedings, any person whose rights may be affected must be made a party and given notice of the proceedings. However, the Supreme Court held that since counsel for probationer in the revocation proceedings had represented the Circuit Court in the Supreme Court, it was not necessary for him to be made a party.

This holding does not take into account the probationer's due process and equal protection rights. He

was not given an opportunity to be heard in person, to present witnesses and documentary evidence or the right to confront and cross-examine adverse witnesses, all of which are required by *Gagnon* v. *Scarpelli*, supra, in a probation revocation hearing. The proceedings in the West Virginia Supreme Court was not an appellate review of the Circuit Court's decision, but an original proceeding wherein facts were in dispute which were critical to probationer's liberty, including whether he had committed a second felony, plead guilty to same and whether the Circuit Court had found him to have committed a second felony. This was, in effect, an extension of the probation revocation hearing and probationer was denied his right to be present and defend.

Basic due process requirements of any person, whether a probationer or otherwise, dictate certain minimum requirements. Disregarding the fact that the prohibition action in any way affected a criminal defendant's rights to liberty, the failure to make him a party affected his rights. The Circuit Court was in no position to protect the accused's rights and should not be expected to so do. Some of the basic rights of probationer which were violated were (1) the right to be present; *Holt* v. *Virginia*, 381 U. S. 131, 85 S. Ct. 1375, 14 L.Ed.2d 290 (1965); (2) the right to raise issues in the proceeding; *Lindsey* v. *Normet*, 405 U. S. 56, 92 S. Ct. 862, 31 L.Ed.2d 36 (1972); (3) the right to be heard at a meaningful time and in a meaningful manner; *Goldberg* v. *Kelly*, 397 U. S. 254, 90 S. Ct. 1011, 25 L.Ed.2d 287 (1970); and (4) the right to a fair hearing; *Turner* v. *Louisiana*, 379 U. S. 466, 85 S. Ct. 546, 13 L.Ed.2d 424 (1965). The fact that probationer's counsel represented the Circuit Court in the prohibition proceeding did not give the probationer

an opportunity to answer or defend the accusations of the State of West Virginia.

CONCLUSION

For these reasons, petitioner prays that a writ of certiorari should issue to review the judgment and opinions of the Supreme Court of Appeals of West Virginia.

Respectfully submitted,

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West Virginia 25301
Counsel for Petitioner

APPENDIX

NO. 14352

[Filed May 22, 1979

George W. Singleton, Clerk of the Supreme Court of Appeals of West Virginia]

STATE EX REL. CLETUS B. HANLEY, PROSECUTING ATTORNEY

v.

JOHN HEY, JUDGE, CIRCUIT COURT OF KANAWHA COUNTY

Prohibition — Writ Granted

McGraw, Justice

1. Under the terms of W. Va. Code § 62-12-10, a circuit court exceeds its legitimate authority when it suspends the execution of sentence and releases on probation an offender who has been adjudged in a probation revocation proceeding to have committed a felony while on probation.

2. Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syl. pt. 2, *State ex rel. Winters* v. *MacQueen*, ... W. Va. ....., 239 S.E.2d 660 (1977).

McGraw, Justice:

We granted a rule to show cause in this prohibition proceeding to consider the narrow and limited question of whether a circuit court has the power to continue the probation of an individual who is adjudged in a final revocation hearing to have violated a condition of his probation by committing a felony. We answer the question in the negative and say that the respondent

trial court exceeded its legitimate powers by granting probation. We grant the writ.

In September of 1977, Gregory Dale O'Scha plead guilty to a felony charge and was placed on probation for a period of two years by the Circuit Court of Kanawha County. Subsequently, the probation authorities sought to revoke his probation. The probationer was given written notice of the charge against him in both the preliminary and final revocation proceedings, namely, that he had committed a breaking and entering or entry without breaking of a certain store house located in Kanawha County in May of 1978. Following the final revocation hearing, the trial court entered an order revoking probation based on a plea of guilty to the charge against him.

Thereafter the probationer was sentenced on his original 1977 felony conviction. Counsel for the probationer filed a timely motion for reconsideration of the sentence, and after a hearing on the motion, the trial court suspended the sentence previously imposed upon a finding that "the character of the offender and the circumstances of the case now indicate that he is not likely again to commit crime, and that the public good does not require that he be further imprisoned in the West Virginia State Penitentiary. . . ."

I.

Article 12 of Chapter 62 of the West Virginia Code contains the law of this State regulating the probation of criminal offenders. Section 1 of that article provides that "[a]ny Circuit court of this State shall have authority *as provided in this article* to place on probation any person convicted of a crime." (Emphasis added). This provision specifically authorizes circuit courts of

this State to place on probation any person convicted of a crime to the extent that such authority is provided for in other sections of article 12.

Section 2 sets forth the categories of persons who shall be initially eligible for probation upon the conviction of a crime. Section 10 is the source of a circuit court's authority to continue the period of probation where a term or condition of probation has been violated. This section reads in pertinent part as follows:

> If, despite a violation of the conditions of probation, the court or judge shall be of the opinion that the interests of justice do not require that probationer serve his sentence, the court or judge may, *except when the violation was the commission of a felony*, again release him on probation. (*emphasis supplied*).

This section authorizes a circuit court to continue the term of probation despite the violation of a condition of probation where the interests of justice do not require the probationer to serve his sentence. The Circuit Court, however, is expressly prohibited from releasing an individual on probation ". . . when the violation was the commission of a felony."

The respondent argues this exception is only applicable where a probationer is actually indicted and convicted of a felony, and does not become operative where a probationer is merely adjudged to have violated a condition of probation by the commission of a felony.

We do not accept this interpretation. The language of section 10 is clear and unambiguous. If the Legislature wanted to limit the exception to felony convictions, it could have used the words "conviction" of a

felony instead of "commission" of a felony, as it did in other sections of Article 12.

The statutory exception to a trial court's authority to again release a person on probation, despite a violation of a term of probation, is applicable here. The statute simply does not authorize continued probation on the facts in this case.

While we recognize that probation statutes have been held to be remedial in nature and subject to liberal construction, *Dyke* v. *Commonwealth*, 193 Va. 478, 69 S.E.2d 483 (1952), such construction is not permissible where, as in this case, the provision is free from ambibuity.

As we observed in our recent pronouncement in *State ex rel. Winter* v. *Scott*, ___ W. Va. ___, ___, 239 S.E.2d 660, 661 (1977), "[t]he judge's discretion in matters of probation . . . [is] proscribed by legislative fiat and . . . he is bound thereby."

Accordingly, the circuit court exceeded its legitimate power by again suspending the imposition or execution of sentence and releasing the offender on probation. "Prohibition will lie to prohibit a judge from exceeding his legitimate powers." Syl. pt. 2, *State ex rel. Winter* v. *MacQueen, supra.*

The respondent also argues that prohibition is not proper in this case because the probationer was not made a party to this proceeding. As a general rule in prohibition proceedings, any person whose rights may be affected by the issuance of a writ must be made a party and must be given notice of the proceeedings. *State ex rel. Partain* v. *Oakley*, ___ W. Va. ___, 227 S.E.2d 314 (1976); 15 M. J. *Prohibition* § 20 (1979).

The record reveals that counsel for the probationer was present during all the proceedings in this case and, in fact, he defended the actions of the respondent judge by acting as his counsel before this Court. The interests of the respondent judge and the probationer are identical as both seek to preclude issuance of the writ of prohibition on the ground that the respondent judge had the authority to release the offender on probation. The offender's interests were thus represented by his counsel. Under these special circumstances, we do not find the general rule controlling.

Writ granted.

NO. 14352

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd day of May, 1979, the following order was made and entered, to-wit:

State of West Virginia ex rel. Cletus B. Hanley,
Prosecuting Attorney of Kanawha County,
West Virginia,
Relator,

vs.

John Hey, Judge of the Circuit Court of Kanawha
County, West Virginia,
Respondent.

The Court having maturely considered the petition and exhibits, the rule awarded thereon, the separate answer and demurrer of the respondent to relator's petition, and the argument and briefs of counsel thereon, is of the opinion for reasons stated in writing and filed with the record that the relator is entitled to a writ of prohibition as prayed for in his said petition. It is therefore considered and ordered by the Court that a writ of prohibition do issue, directed to the respondent, John Hey, Judge of the Circuit Court of Kanawha County, West Virginia, restraining and prohibiting him from suspending the sentence imposed on Gregory Dale O'Scha on the 30th day of August, 1978, and placing Gregory Dale O'Scha on probation pursuant to the order of that Court entered October 24, 1978, in No. CR-77-F-214, more fully set forth and described in the petition herein; in accordance with the principles stated in the written opinion aforesaid and further according to law.

The syllabus of points adjudicated, prefixed to the written opinion prepared by Justice McGraw, was concurred in by Chief Justice Caplan, Justices Neely, Harshbarger and Miller.

The service of an attested copy of this order upon the respondent aforesaid shall have the same effect as the service of a formal writ.

A True Copy

Attest: George W. Singleton, Clerk
Supreme Court of Appeals

STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, To-wit:

I, Robert A. Taylor, attorney in the office of Marvin W. Masters, attorney of record for Honorable John Hey, Judge, Circuit Court of Kanawha County, West Virginia, appellant herein, depose and say that on the 15th day of August, 1979, I served a copy of the foregoing Petition For Certiorari on the State of West Virginia, ex rel. its prosecuting attorney, respondent herein by delivering a true and exact copy of same to Francis W. McCoy, Assistant Attorney General, the attorney of record for said respondent.

Robert A. Taylor

Taken, subscribed and sworn to before me this 15th day of August, 1979.

My commission expires .

Wanda L. Roush
Notary Public
Commissioned as Wanda L. Hola